



ANDREW L. FABER
RALPH J. SWANSON
PEGGY L. SPRINGGAY
JOSEPH E. DWORAK
SAMUEL L. FARB
JAMES P. CASHMAN
STEVEN J. CASAD
NANCY J. JOHNSON
JEROLD A. REITON
JONATHAN D. WOLF
KATHLEEN K. SIPLE
KEVIN F. KELLEY
MARK MAKIEWICZ
JOLIE HOUSTON

BRIAN L. SHETLER
HARRY A. LOPEZ
CHARLES W. VOLPE
CHRISTINE H. LONG
AARON M. VALENTI
CHRISTIAN E. PICONE
SUSAN E. BISHOP
SANDRA G. SEPULVEDA
MICHAEL B. IJAMS
KIMBERLY G. FLORES
DAWN C. SWEATT
TYLER A. SHEWEY
JAMES F. LANDRUM, JR.

TEN ALMADEN BOULEVARD
ELEVENTH FLOOR
SAN JOSE, CALIFORNIA 95113-2233

TELEPHONE: (408) 286-5800
FACSIMILE: (408) 998-5388

www.berliner.com
Branch Offices
Merced, CA • Modesto, CA

THOMAS P. MURPHY
ALESHIA M. WHITE
EILEEN P. KENNEDY
MICHAEL J. CHENG
ALEXANDRIA N. NGUYEN
GHAZALEH MODARRESI
BEAU C. CORREIA
TIMOTHY K. BOONE
ANGELA HOFFMAN
DAVID A. BELLUMORI

ISABELLA L. SHIN
BENJAMIN M. JOHNSON
STEPHEN C. SCORDELIS
JUSTIN D. PRUEITT
ANTHONY DeJAGER
ELLEN M. TAYLOR
CYNTHIA M. CHU
BRANDON L. REBBOAH
LINDSAY I. HOVER
EMILY TEWES

RETIRED

SANFORD A. BERLINER
SAMUEL J. COHEN
HUGH L. ISOLA

ROBERT W. HUMPHREYS
ROBERT L. CHORTEK

OF COUNSEL

STEVEN L. HALLGRIMSON
FRANK R. UBHAUS
ERIC WONG

JEFFREY S. KAUFMAN
NANCY L. BRANDT
LESLIE KALIM McHUGH

February 7, 2019

VIA EMAIL ONLY

Lisa Fernandez

Digital Reporter/Producer

KTVU

lisa.fernandez@foxtv.com

Re: California Public Records Act Request, received on January 17, 2019

Dear Ms. Lisa Fernandez:

On behalf of the City of Gilroy ("City"), this letter is in response to your request made pursuant to the California Public Records Act ("PRA") under Government Code Section 6250 et seq. and the Gilroy Open Government Ordinance ("OGO"), under Gilroy City Code, Chapter 17A, received by the City on January 17, 2019. On January 29, 2019, the City responded, and due to the voluminous nature of the records requested and the need for additional time to compile and assess these records, requested an extension of time in accordance with PRA section 6253 and OGO section 17A.25. This letter serves as the City's written response to your PRA request, provided in a timely manner in accordance with Government Code section 6253, and OGO section 17A.25.

You requested the following records and information:

1. *The names and reports of officers involved in police or deputy misconduct and covered under SB 1421. We are seeking records that date back to Jan. 1, 2017 in our initial request. We would like a prompt return of these records, as required by law. Please include video related to the incident.*

2. *As this process can be time-consuming, the second part of our request is asking for records going back to Jan. 1, 2014. We request that "Part 2" of our request be made public considering time restraints. Please include related video.*

3. *In addition, please provide how many complaints from the public about police misconduct regarding the items covered in SB 1421 have you gotten in this time period. (Back to Jan. 1, 2017 first, and then back to Jan. 1, 2014)*

4. *How many department-initiated internal affairs investigations regarding items covered in SB 1421 have you conducted in this time period?*

5. How many claims and lawsuits have you received and settled regarding the items covered in SB 1421 in the same time period?

Any responsive and non-privileged public records that fulfill your PRA request that the City maintains and has in its possession, that are not otherwise exempt, will be electronically sent to you commencing on March 4, 2019, and will continue until completed. Please be aware that the City is in the process of diligently searching for redaction software that can efficiently redact video and audio recordings. As a result, we will produce any videos and audio recordings that require redaction after the City has secured effective redaction tools, within a reasonable amount of time under the circumstances.

While the PRA requires public agencies to provide access to their existing public records, it does not require them to create new records to satisfy a request. (*Sander v. Superior Court* (2018) 26 Cal. App. 5th 651, 665-66.) However, in order to assist you, in accordance with PRA section 6253.1 and OGO section 17A.20(c), we provide here a summary of certain information, below, pursuant to your request related to complaints, department-initiated internal affairs investigations, and claims and lawsuits during the requested period:

The City did not receive any complaints from the public about police misconduct regarding the items covered in SB 1421, between January 1, 2014 to the present.

The City conducted three (3) department-initiated internal affairs investigations regarding items covered in SB 1421 between January 1, 2014 to the present.

The City did not receive and settle any claims or lawsuits regarding the items covered in SB 1421, between January 1, 2014 to the present.

Regarding any responsive public records withheld or redacted, the City sets forth below the following exemptions provided under the PRA and OGO:

The PRA specifically exempts from disclosure: "Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." (Gov't Code § 6254(k); OGO § 17A.27.) If records contain information that must be disclosed along with information that is exempt from disclosure, the portion of the record that must be disclosed, if "reasonably segregable," must be provided for inspection but only "after deletion of the portions that are exempted by law." (Gov't Code § 6253(a); OGO § 17A.20(a).) These exemption rules under the PRA and OGO apply to the bases for exemption, asserted below.

Records Related to an Incident that is the Subject of an Active Criminal Investigation

California Penal Code section 832.7(b)(7)(A) states: "An agency may withhold a record of an incident described in subparagraph (A) of paragraph (1) that is the subject of an active criminal investigation," under the condition that, "disclosure may be delayed for up to 60 days from the date the use of force occurred," and "[a]fter 60 days from the use of force, the agency may continue to delay the disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against an officer who used the force." Section 832.7(b)(7)(A)(ii) further states: "Information withheld by the agency shall be disclosed when the specific basis for

withholding is resolved, when the investigation or proceeding is no longer active, or by no later than 18 months after the date of the incident, whichever occurs sooner.”

Here, pursuant to California Penal Code section 832.7, subdivision (b)(1)(A)(ii), responsive public records related to an incident involving use of force by a peace officer or custodial officer, that is the subject of an active criminal investigation, have been withheld because disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against the officer or officers who used the force, and less than 18 months have passed since the date of the incident. (Gov’t Code § 6254(k); OGO § 17A.27.) In accordance with California Penal Code section 832.7, subdivision (b)(1)(A)(ii), the City will “at 180-day intervals as necessary, provide, in writing, the specific basis for the agency’s determination that disclosure could reasonably be expected to interfere with a criminal enforcement proceeding.”

Personal Data or Information

California Penal Code section 832.7(b)(5) requires that the City redact a record “to remove personal data or information. . . other than the names and work-related information of peace and custodial officers,” and to “preserve the anonymity of complainants and witnesses.” (Gov’t Code § 6254(k); OGO § 17A.27.) In addition, that same section protects information from disclosure that “would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about misconduct and serious use of force by peace officers and custodial officers.” (Gov’t Code § 6254(k); OGO § 17A.27; Pen. Code § 832.7(b)(5).)

Here, the public records disclosed have been redacted to remove personal data or information, including but not limited to the names, faces, and other personal identifying information of complainants, victims, and witnesses. (Gov’t Code § 6254(k); OGO § 17A.27; Pen. Code § 832.7(b)(5).)

Attorney-Client Communications

The attorney client privilege is an evidentiary rule that protects from disclosure the entirety of confidential communications between attorney and client, including factual and other information not in itself privileged outside of attorney client communication. (*See* Cal. Evid. Code § 954; *Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal.4th 725; *Fireman’s Fund Insurance Company v. Superior Court* (2011) 196 Cal.App.4th 1263.)

Therefore, any confidential communications related to your requests set forth above between the City Attorney and officers, agents or representatives of the City, including but not limited to City staff, the Mayor, City Councilmembers, as well as any other attorney within the same firm, will be withheld or redacted to protect from disclosure any attorney-client communications. (Gov’t Code § 6254(k); OGO § 17A.27.)

No Duty to Create a Privilege Log

The PRA does not require that the City create a privilege log or a list that identifies the specific records being withheld. The City’s response only needs to identify the legal grounds for nondisclosure. (*Haynie v. Superior Court* (2001) 26 Cal.4th 1061.)

Lisa Fernandez
KTVU
February 7, 2019

To the extent that the City has provided all responsive and non-privileged public records the City maintains and has in its possession, your PRA request has been satisfied. If there are other public records you wish to review under the PRA that are not covered by the City's response, please clarify your request. Records in response to your clarified request, if they exist and are subject to disclosure under the PRA, will be made available. If you have further information or authority which you believe would require disclosure of additional records under the PRA, I would be happy to review that information and/or authority.

Very truly yours,

BERLINER COHEN, LLP



JOLIE HOUSTON

Assistant City Attorney, City of Gilroy
E-Mail: jolie.houston@berliner.com

JH

cc: Shawna Freels, City Clerk
Scot Smithee, Police Chief
LeeAnn McPhillips, Human Resources Director/Risk Manager